

EXPLANATORY STATEMENT

Migration Regulations 1994

Migration (LIN 19/213: Specification of Income Threshold and Annual Earnings and Methodology of Annual Market Salary Rate) Amendment Instrument 2019

(Subregulation 2.72(17) and paragraphs 2.72(15)(b); 2.72(15)(d) and 2.79(1A)(b))

1. The instrument, LIN 19/213, is made under subregulation 2.72(17) and paragraphs 2.72(15)(b); 2.72(15)(d) and 2.79(1A)(b) of the *Migration Regulations 1994* (the Regulations).
2. The instrument amends IMMI 18/033 (F2018L00284) made under subregulation 2.72(17) and paragraphs 2.72(15)(b); 2.72(15)(d) and 2.79(1A)(b) of the Regulations in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (the AIA). Subsection 33(3) of the AIA states that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.
3. The purpose of this instrument is to amend *Migration (IMMI 18/033: Specification of Income Threshold and Annual Earnings and Methodology of Annual Market Salary Rate) Instrument 2018* (IMMI 18/033) to address changes to the Regulations as a result of amendments to the Regulations by the *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (the amending Regulations).
4. The amending Regulations introduce the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa (Subclass 494 visa) and provisions of the Regulations that require the Minister to consider this instrument, see subregulations 2.72C(15) and (16), and subregulation 2.79A(2) of the Regulations.
5. Subregulations 2.72C(15) and (16) of the Regulations require the Minister to consider a nominee's annual earnings, and the annual market salary rate if the Minister is not satisfied that the nominee's annual earnings in relation to the occupation will be at least the amount specified in the principal instrument.

6. Subregulation 2.79A(2) provides that the obligation to ensure equivalent terms and conditions of employment for the Subclass 494 visa do not apply to a standard business sponsor of a primary sponsored person if the annual earnings are equal to or greater than the amount specified by the Minister in this instrument.
7. The instrument is part of a package introducing new regional visas designed to deliver a migration program that can respond more effectively to the needs of regional Australia. These changes will also assist with governmental priorities to attract highly skilled migrants to regional areas and ease population pressure in major cities.
8. The purpose of the instrument is to repeal Part 4 of IMMI 18/033 and replaces it with a new application provision. The replacement application provision includes a note highlighting application of the instrument to certain visas through operation of the Regulations. The purpose of this amendment is to clarify the application of the instrument and act as a signpost for those relevant provisions.
9. Section 17 of the *Legislation Act 2003* requires consultations, which are appropriate and reasonably practicable to be undertaken. The following Commonwealth government agencies were consulted in relation to the instrument: the Department of Prime Minister and Cabinet; the Department of Foreign Affairs and Trade; the Attorney-General's Department; the Department of the Treasury; the Department of Finance; the Department of Social Services; the Department of Education; the Department of Employment, Skills, Small and Family Business; the Department of Industry, Innovation and Science; the Department of Infrastructure, Transport, Cities and Regional Development; the Department of Health; and the Department of Human Services.
10. Pursuant to the frequency and volume of the legislative amendments that are required to maintain a dynamic and responsive immigration system, it has been a consistent practice to include certain criteria and conditions in delegated legislation. The criteria for the new Subclass 494 visa has been included in delegated legislation rather than primary legislation to give the Government oversight and the ability to respond in a timely and transparent manner to emerging situations, which may include changes in the labour market and the economy. In addition, instruments made under delegated legislation are subject to the scrutiny framework in the *Legislation Act 2003*, and oversight of the amendments is available to the Parliament under the same legislation.

11. The Office of Best Practice Regulation (OBPR) has advised that a Regulatory Impact Statement is not required (OBPR Reference 25045).
12. Under section 42 of the *Legislation Act 2003*, the instrument is subject to disallowance and therefore a Statement of Compatibility with Human Rights has been provided at Attachment A.
13. The whole of this instrument commences at the same time as the commencement of Schedule 2 to the *Migration Amendment (New Skilled Regional Visas) Regulations 2019*.

Attachment A

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Migration (LIN 19/213: Specification of Income Threshold and Annual Earnings and Methodology of Annual Market Salary Rate) Amendment Instrument 2019

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

This instrument amends *Migration (IMMI 18/033: Specification of Income Threshold and Annual Earnings and Methodology of Annual Market Salary Rate) Instrument 2018* (IMMI 18/033). Pursuant to the *Migration Regulations 1994* (the Regulations), IMMI 18/033 specifies arrangements for ensuring visa applicants are provided with remuneration and employment conditions that are at least equivalent to what is, or would be, provided to an Australian worker performing the same work at the same location.

The purpose of this instrument, *Migration (LIN 19/213: Specification of Income Threshold and Annual Earnings and Methodology of Annual Market Salary Rate) Amendment Instrument 2019* (LIN 19/213) is to update the application provision of IMMI 18/033 to confirm it applies to the new Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa (Subclass 494 visa), through operation of the Regulations. The Subclass 494 visa was inserted into the Regulations by the *Migration Amendment (New Skilled Regional Visas) Regulations 2019* with effect from 16 November 2019.

The amendment assists interpretation of the instrument by highlighting that the specified amount of annual earnings, Temporary Skilled Migration Income Threshold (TSMIT) for the nominated occupation, and the Annual Market Salary Rate (AMSR) for the nominated occupation, as specified in IMMI 18/033, extend to the new Subclass 494 visa.

This amendment operates to insert a note in IMMI 18/033 to clarify that the instrument applies to the new Subclass 494 visa, through operation of the Regulations (see 2.72C(15) and (16) of the Regulations).

The amendment also confirms that this instrument applies to, and will continue to apply to additional visas, through operation of the Regulations (see paragraph 5.19(5)(o), for instance). The amendment inserts a note to highlight the provisions of the Regulations which operate to have this instrument apply to additional visas.

For a foreign worker nominated under section 140GB of the *Migration Act 1958* (the Act) or regulation 5.19 of the Regulations, the AMSR and the nominee's guaranteed monetary earnings must be equal to or greater than the TSMIT. When the guaranteed monetary earnings are below the TSMIT, the option exists to take into account non-monetary benefits where reasonable. The meaning of Earnings is defined in regulation 2.57A of the Regulations. The TSMIT is currently set at a level that is above the guaranteed minimum wage (in annual terms) for Australian workers.

The method for calculating the AMSR depends on whether there is an Australian worker who is performing equivalent work for the relevant occupation. Section 7 of IMMI 18/033 provides the method for determining the AMSR where an Australian worker is performing equivalent work. Section 8 of IMMI 18/033 provides the method of determining the AMSR where there is not an Australian worker who is performing equivalent work.

Under the Regulations, an AMSR assessment is not required if the annual earnings are equal to, or greater than, the amount specified in IMMI 18/033, which is \$250,000 AUD. It is expected that persons being remunerated at this level are highly skilled and in high demand. As such, they are expected to be able to negotiate their own

terms and conditions without additional oversight or intervention from the Department of Home Affairs, beyond ensuring that the nominated worker is actually receives earnings to this level.

Human rights implications

The amendment in this Legislative Instrument confirms that the AMSR and TSMIT arrangements specified in IMMI 18/033 apply in relation to the new Subclass 494 visa.

Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

In supporting visa requirements relating to the remuneration a foreign worker is to receive when seeking to migrate to Australia on a Subclass 494 visa, the amendment in this Instrument engages the above right.

In conjunction with the Act, the Regulations and Instrument IMMI 18/033, the amendment in this Instrument assists in confirming that a Subclass 494 visa holder will receive remuneration and employment conditions that are at least equivalent to what is, or would be, provided to an Australian worker performing the same work at the same location. This is consistent with the right in Article 7(a) of the ICESCR.

Conclusion

The Legislative Instrument is compatible with human rights because it helps promote the right to fair conditions at work for holders of the new Subclass 494 visa.

David Coleman

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